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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 836.

THE YANKTON SIOUX TRIBE OF INDIANS,
PETITIONERS,

vs.

THE UNITED STATES, RESPONDENT.

BRIEF FOR PETITIONERS.

Statement of the Case.

Pursuant to the Act of June 3, 1920 (41 Stat., 738), the petition herein was filed in the Court of Claims July 31, 1924; September 30, 1924, the defendant below filed a general traverse; May 8, 1925, the case was submitted without argument; June 8, 1925, the judgment of the Court of Claims dismissing the petition was entered; June 22, 1925, motion for new trial and brief in support thereof were filed; October 26, 1925, the said

motion was disallowed; December 9, 1925, petition for writ of certiorari and brief in support thereof was filed; January 19, 1926, writ of certiorari was allowed; and on January 25, 1926, the said writ was presented in open court in the Court of Claims. On the writ granted this brief is now filed.

The Facts.

The facts material to this petition are as follows: April 19, 1858, petitioners entered into a treaty with the United States (11 Stat., 743), Article VIII of which is as follows:

> "The said Yankton Indians shall be secured in the free and unrestricted use of the red pipestone quarry, or so much thereof as they have been accustomed to frequent and use for the purpose of procuring stone for pipes; and the United States hereby stipulate and agree to cause to be surveyed and marked so much thereof as shall be necessary and proper for that purpose, and to retain the same and keep it open and free to the Indians to visit and procure stone for pipes so long as they shall desire." (Record, p. 25.)

In 1884 this Court, in the case of U. S. *v.* Carpenter, 111 U. S., 435, vacated a patent granted by the Secretary of the Interior May 15, 1874, to a settler on the Pipestone Reservation (Record, p. 26).

In 1887 the Government employed United States troops to remove intruders upon the said reservation (Record, p. 26).

The Court will take judicial notice of the Act of March 2, 1889 (25 Stat., 1012), by which Congress directed that the value of the "Red Pipestone Indian Reservation" be appraised, including the actual value of the strip of land one hundred feet wide across the said reservation, then occupied by the Cedar Rapids, Iowa Falls and Northwestern Railway Company, "as well as the damage to the balance of the lands of said reservation by reason of the taking and occupancy of said strip for railroad purposes;" * * *.

In section 3 of the said Act of March 2, 1889, it was provided:

> "This act shall take effect and be in force and authorize the entry and sale of the said right of way, or any tract or parcel of land so appraised, so soon as, and not until, a majority of the adult male Indians of the Yankton Tribe of Sioux Indians consent to the entry and sale of such right of way, or of said appraised lands, or of any part of the same. And if said Indians shall at any future time consent in the manner above stated, to the sale or disposal of any tract or parcel of said appraised land, to the sale of which their consent had not theretofore been given, such tract or parcel shall then be sold in the manner hereinbefore provided. Patents shall be issued in due form for any lands, or the right of way, entered or sold by virtue of this act, and the moneys arising from the sale of said land, right of way, and damages, after deducting the expense of said appraisement, shall be covered into the annuity fund of said Indians, or expended in such manner as the Indians may determine, subject to the approval of the Secretary of the Interior;" * * *.

Pursuant to this act the sum of $1,740.00 paid to the Government by the Cedar Rapids and Northern Railway Company for a right of way through the Pipestone Reservation, was distributed in 1891 by the Secretary of the Interior among petitioners (Record, p. 26).

The court will take judicial notice of the Act of February 16, 1891 (26 Stat., 764), by which the Secretary of the Interior was directed to cause industrial or training schools to be established in the States of Wisconsin, Michigan, and Minnesota, and in section 2 of the said act it was expressly directed that the school erected in Minnesota upon the Pipestone Reservation, the title to the necessary land therefor to be acquired by "purchase, condemnation, or otherwise."

The said Act of February 16, 1891, was set out in the report of Inspector James McLaughlin, found by the Court of Claims to have been submitted to Congress and printed as House Document No. 535, 55th Cong., 1st Sess. (Record, p. 27).

Inspector James McLaughlin reported on October 2, 1899 (House Document No. 535, 55th Cong., 1st Sess., p. 31), that "all of said reservation" was appropriated without appraisal by the Department of the Interior, and a school was erected thereon as provided in section 2 of the Act of February 16, 1891 (Record, p. 27).

The Indians were not compensated for their rights in the said reservation as required by the Act of February 16, 1891 (Record, p. 27).

December 31, 1892, petitioners entered into agreement with the United States which was ratified by the Act of August 15, 1894 (28 Stat., 286).

Article I of this agreement is as follows:

> "The Yankton Tribe of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said Indians as aforesaid."

A part of the consideration which passed to petitioners for the cession made in Article I above was the consideration contained in Article XVI, which is section 12 of the Act of August 15, 1894, being as follows:

> "If the Government of the United States questions the ownership of the Pipestone Reservation by the Yankton Tribe of Sioux Indians under the treaty of April 19, 1858, *including the fee to the land, as well as the right to work the quarries,* the Secretary of the Interior shall as speedily as possible refer the matter to the Supreme Court of the United States to be decided by that tribunal. And the United States shall furnish, without cost to the Yankton Indians, at least one competent attorney to represent the interest of the tribe before the Court. *If the Secretary of the Interior shall not, within one year* after the ratification of the agreement by Congress, refer the question of ownership of the said Pipestone Reservation to the Supreme Court as provided for above, *such failure upon his part shall be construed as and shall be waiver by the United States* of all its rights to the ownership of *the said Pipestone Reservation, and the same shall thereafter be solely the*

> *property of the Yankton Tribe of Sioux Indians* including the fee to the land." (Italics added.) (Record, pp. 26-27.)

By virtue of Article I of the agreement of 1892, respondent took possession of 151,692.4 acres of unallotted lands belonging to petitioners, being a part of the 400,000 acres reserved by them in the Treaty of 1858, and threw the same open as public domain, which has since been taken up by settlement under United States land laws and patents. (Proclamation of the President, May 16, 1895; letter of the Secretary of the Interior to the Commissioner of the General Land Office, May 17, 1895, and attached schedules.)

The Secretary of the Interior submitted the question of the ownership of the Pipestone Quarry Reservation to the Department of Justice. (Record, p. 27.) The Attorney General advised him that it was "impracticable" to comply with section 12 of the Act of August 15, 1894, and the Secretary of the Interior did not refer the question to the Supreme Court within one year after August 15, 1894, nor has he ever done so (Record, p. 27).

By the Act of June 7, 1897 (30 Stat., 87), Congress directed the Secretary of the Interior to negotiate with petitioners for the purchase of the land upon which the school on the Pipestone Reservation had been erected (Record, p. 27).

On October 2, 1899, Inspector James McLaughlin, acting on behalf of the Secretary of the Interior, entered into an agreement with petitioners wherein they agreed to accept $100,000.00 for their interests in the

Pipestone Reservation. The said agreement of October 2, 1899, was transmitted to Congress by the Secretary of the Interior on March 24, 1900, printed as House Document No. 535, 55th Cong., 1st Sess., and on April 4, 1906, the Senate Committee on Indian Affairs rendered a favorable report thereon. (S. Rep. 2369, 59th Cong., 1st Sess.) (Record, p. 27.)

No action was taken on the said report, and petitioners have received no compensation of any kind for their rights in the Pipestone Reservation (Record, p. 27).

The court will take judicial notice of the fact that the school erected on the Pipestone Reservation by the Secretary of the Interior is a governmental institution, and from the official records thereof that the Pipestone Indian Training School now includes more than twenty buildings, eleven of which are of brick taken from the Pipestone Quarry, and an experimental farm which is located on the Pipestone Reservation.

By the Act of January 9, 1925 (43 Stat., 730), Congress conferred jurisdiction upon the Court of Claims to adjudicate the particular claim of petitioners for compensation for their rights in the Pipestone Reservation, the said act being as follows:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That jurisdiction be, and it hereby is, conferred upon the Court of Claims to determine and report from the finding of facts reported by said court as authorized by section 22 of the Act of April 4, 1910 (Thirty-eighth Statutes at Large, page 284), the interest,

title, ownership, and the right of possession of the Yankton Band of Santee Sioux Indians in and to the land known as the "Red Pipestone Quarries," described in said Act of April 4, 1910; and said court shall determine what amount, if any, is legally and equitably due from the United States, to the said Yankton Band of Santee Sioux Indians for the said quarries, and enter judgment thereon.

"SEC. 2. That the court is hereby further authorized to determine what, if any, other band or bands of Sioux Indians have an interest in and to the said Red Pipestone Quarries, and the amount thereof, if any." (Record, p. 1.)

The Decision and Opinion of the Court of Claims.

Upon the facts stated the decision and opinion of the Court of Claims (June 8, 1925), were as follows:

"CONCLUSION OF LAW.

"Upon the foregoing findings of fact the court decides as a conclusion of law:

"(1) That the only interest possessed by the plaintiffs in and to the land known as the Red Pipestone Quarries is the right 'to the free and unrestricted use of the Red Pipestone Quarries, or so much thereof as they have been accustomed to frequent and use for the purpose of procuring stone for pipes,' and this right, guaranteed to plaintiffs by Article VIII of the treaty of April 19, 1858 (11 Stat. 743, 746), has been continuously secured to them since the date of said treaty by the United States in strict conformity with the terms of said treaty.

"(2) That no amount 'is legally and equitably due from the United States' to the plaintiffs, and it is therefore adjudged and ordered that their petition filed herein be, and the same is hereby, dismissed.

"OPINION.

"BOOTH, *Judge*, delivered the opinion of the court:

"This is an Indian claim before the court under special jurisdictional acts. The Yankton Sioux is one of the numerous bands of the Great Sioux Nation which anciently inhabited a vast territory in the northwestern section of the country. The Yankton Sioux were known as one of the several bands generally designated as the Sioux of the Missouri. The Government negotiated and concluded various treaties with the different bands, with a view to acquiring title to their lands and providing suitable reservations for their occupancy. As to these treaties, the terms of which appear in the findings of this court in case No. 31253, we need enter upon no discussion. *Yankton Sioux* v. *United States*, 53 C. Cls.' 67. As usual in such cases disputations arose, claims upon the part of the Indians were asserted, and the controversy with respect to the same culminated in the acts of April 4, 1910, 36 Stat., 269-284, and March 3, 1911, 36 Stat., 1058-1065, referring the case to this court with the limited authority to report back to Congress the court's findings of fact with respect to the subject matter. The court, from a complete record, reported its findings of fact without comment or allusion to issues of law.

"On June 30, 1920, 41 Stat., 738, Congress enacted the special jurisdictional act under which the claim of the Yankton Sioux is again before us. The grant of jurisdiction under this statute extended generally to the Sioux Tribe of Indians and comprehended all claims not heretofore determined by the court. Subsequently, on January 9, 1925 (Public No. 313, 68th Cong.), while the case was pending under the act of 1920, Congress conferred jurisdiction upon the court to adjudicate the claim of the plaintiff Indians, long asserted and persistently adhered to, for the value of the Red Pipestone Quarries, as it may or may not appear from the findings of the court in case No. 31253. In other words, the final jurisdictional act recognized the verity of the findings reported in case No. 31253 and granted authority to adjudicate and determine the claim of the plaintiff Indians as the findings in the former case disclose it. The plaintiff Indians did not amend their petition after the passage of the act of 1925. The petition was filed July 31, 1924, and the petition should have been amended. Inasmuch as the record now before us and the original petition itself prefers no claim other than for the Pipestone Quarries, and in view of the fact that the findings in this case, in any event, would be but a duplication of the findings in case No. 31253, we think the state of the record sufficient for us to dispose of the case.

"On April 19, 1858, 11 Stat., 743, by express treaty stipulations, the plaintiff Indians ceded all of the lands owned, possessed, or claimed by them, wherever situated, for the sum of $1,650,000, payable in fifty years, at the time reserving for the band a reservation of 400,000 acres on

the Missouri River. Not only was this a general relinquishment of all the lands mentioned, but the settlement comprehended all outstanding differences and was designed to conclude the claims of the band against the Government arising from any source whatever. The treaty of 1858 embraced the Pipestone Quarries, but from time immemorial the Sioux had enjoyed a common privilege of visiting the quarries and taking therefrom sufficient stone for pipes and Indian ceremonials. Article VIII of the treaty reserved to the Indians this ancient privilege. Manifestly it was at the time, and may now be, a right of value and importance; at least the Yanktons so appraised it and the Government recognized it. The right and privilege, however, was not akin to the right of occupancy, the recognized Indian tribal title. It was in the nature of an easement. Its extinguishment, had the Government ever done so, would not warrant the court in awarding a judgment in any such amount as here claimed. As a matter of fact, however, and the court so finds, the right has not been extinguished by the Government. On the contrary, the easement has been continuously recognized by the Government, and the Yanktons have never been denied the privilege. The quarries are now, and ever have been, open, free, and available to the Indians without let or hindrance upon the part of the Government. There is absolutely nothing in the record to even suggest a contrary finding.

"Article XII of the treaty of 1892, ratified by section 12 of the act of August 13, 1894, 28 Stat., 286, 314, 317-319, in nowise constitutes a recognition of title to the lands in question in the Indians. What the legislation covers is a mere

grant of authority and direction to determine the validity of the Indians' persistently asserted claim to the lands. The terms of this article are *sui generis*. Manifestly, it imposed upon the Secretary of the Interior a duty it was impossible under the law to discharge. The Secretary was powerless to invoke the jurisdiction of the Supreme Court under the law, and the imposition of duty without the added provisions indispensable to its performance was beyond the power of Congress in this respect. This court was confronted with a similar situation in the case of *Muskrat* v. *United States*, 219 U. S., 346. Other contentions are advanced by the plaintiff Indians. They are in the main predicated upon inferences said to be deducible from acts of Congress and a decision of the Supreme Court. We have examined them with care. A sufficient answer is found in the apparent fact that Congress, possessed with plenary power and authority over Indian tribal lands and property, in the whole course of its dealings with the matter here involved has carefully refrained from recognizing the validity of the claim here preferred, and in no instance has evinced a willingness to do more than refer the matter to a court for adjudication. This case stands out, in fact, as a conspicuous example of governmental recognition of Indian rights created by treaty stipulations.

"The complaint of the plaintiff Indians is, in our view of the record, without merit, and the petition will be dismissed. It is so ordered.

"Hay, judge; Downey, judge, and Campbell, Chief Justice, concur.

"Graham, judge, took no part in the decision of this case."

Specification of Errors.

1. The Court of Claims erred in holding that under the Act of January 9, 1925, petitioners are not entitled to compensation for the appropriation pursuant to the Act of February 16, 1891, by the United States of the Pipestone Reservation to the use of a Federal Indian Industrial School.

2. The Court of Claims erred in holding that petitioners did not acquire the fee in the Pipestone Reservation under the Act of August 15, 1894, through the failure of the Secretary of the Interior to refer the question of ownership of the said Pipestone Reservation to the Supreme Court before August 15, 1895.

3. The Court of Claims erred in not rendering judgment in favor of petitioners for damages in the sum of $100,000.00 with interest thereon to date from February 16, 1891, for the misappropriation by the United States of February 16, 1891, of the said reservation.

ARGUMENT.

I.

The Decision of the Court of Claims Analyzed.

Upon the facts stated, in order to render a decision denying any liability whatsoever on the part of the United States, the court below had many legal obstacles to get around.

First, in order to prevent the title to the fee from vesting in petitioners under section 12 of the Act of August 15, 1894, it had to declare void that section, thus throwing the petitioners back upon the treaty of April 19, 1858 (11 Stat., 743).

Second, in as much as the facts showed that the entire Pipestone Reservation had been appropriated to the use of a governmental educational institution, and Article VIII of the treaty of 1858, guaranteed to petitioners certain exclusive rights in the Red Pipestone Quarry, it had to create an artificial distinction between the Red Pipestone Quarry and the Pipestone Reservation, in order to make the admitted appropriation of the reservation to public use consistent with the admitted rights of petitioners in the quarry.

But here again it was confronted with difficulties, since Article VIII of the treaty of 1858 did not limit petitioners to the right merely to enter upon an existing reservation for the purpose of taking stone from any quarry pits that might be thereon. When that portion of the Red Pipestone Quarry necessary for petitioners had been surveyed and set off to the use of petitioners, as agreed, it was the quarry itself that was to be reserved as the Pipestone Reservation, and that reservation was to be retained and kept "open and free to the Indians to visit" so long as they might desire. Plainly, then, there never was a reservation except that part of the quarry that was surveyed and set apart to petitioners.

Here, indeed, was an embarrassment for the court,

since no distinction was in fact possible between the Red Pipestone Quarry and the Pipestone Reservation.

The difficulty was solved by a decision which arbitrarily ignored the latter part of Article VIII, as will appear from a comparison of the decision with Article VIII, placed one above the other, below:

Article VIII of the Treaty of 1858 was as follows:

> "The said Yankton Indians shall be secured in the free and unrestricted use of the red pipestone quarry, or so much thereof as they have been accustomed to frequent and use for the purpose of procuring stone for pipes; and the United States hereby stipulate and agree to cause to be surveyed and marked so much thereof as shall be necessary and proper for that purpose, and to retain the same and keep it open and free to the Indians to visit and procure stone for pipes so long as they shall desire." (Record, p. 25.)

The decision of the Court of Claims was as follows:

> "(1) That the only interest possessed by the plaintiffs in and to the land known as the Red Pipestone Quarries is the right 'to the free and unrestricted use of the Red Pipestone Quarries, or so much thereof as they have been accustomed to frequent and use for the purpose of procuring stone for pipes,' and this right, guaranteed to plaintiffs by Article VIII of the treaty of April 19, 1858 (11 Stat., 743, 746), has been continuously secured to them since the date of said treaty by the United States in strict conformity with the terms of said treaty." (Record, p. 28.)

The discrepancy between Article VIII and the decision of the Court below construing it, is amazing.

In reaching its extraordinary decision, however, and apparently without perceiving it, the Court below placed respondent in such a position that it could not support the decision. As declared in the brief filed by the Solicitor General, at page 5, "The United States does not feel justified in opposing the petition for certiorari."

And why is this?

Not because the Guardian Government has had a change of heart, or become more solicitous of the rights of its Indian wards. Its attitude was in no sense dictated by an altruistic motive. On the contrary, it was purely in its own interest that it had to concur in the petition for the writ of certiorari as a necessary step to set aside the palpably erroneous decision of the Court below. Thus, in the dilemma in which it found itself, the Solicitor General had to make the following admission, at page 9, in respondent's brief:

> "The other point of view is, that Article XVI of the agreement of 1892 contemplated that the United States should have some choice in the matter, and that if the title in fee simple was to vest in the Indians it should do so only as the result of a *voluntary* waiver and voluntary nonaction by the United States, and that as the method prescribed for settling the question of ownership was impossible, because of the constitional want of jurisdiction of this Court to deal with the matter as prescribed, there was no voluntary waiver, and the United States could not exercise any choice. From this point of view

> it would follow that the whole of Article XVI should be considered inoperative on the ground that the latter part of it would not have been agreed to, without the provision for referring the matter to the Court. The difficulty here is that, by the same reasoning, the *whole* of the agreement of 1892 would have to be considered inoperative because of the failure of one essential provision of it, and since, by other provisions of the agreement, Indian lands were sold to the United States which have since been disposed of by it, a complete abrogation of the agreement of 1892 for failure of part of it is impossible."

In other words, if section 12 of the Act of August 15, 1894, which was a mere ratification of Article XVI of the Agreement of December 31, 1892, was void, Article XVI was void.

This led to serious consequences. Since the undertaking of respondent stipulated in Article XVI of the agreement was an inseparable part of the consideration which passed to petitioners for the cession made in Article I, and was, therefore, unseverable from the agreement in its entirety, the holding that section 12 of the Act of 1894 was void was necessarily tantamount to the holding void of the entire agreement of 1892, which in turn made respondent liable for the misappropriation of the lands taken by it under Article I thereof.

The concluding words of the opinion of the Court below—"This case stands out, in fact, as a conspicuous example of governmental recognition of Indian rights created by treaty stipulations"—are not, therefore, without a suggestion of irony.

Indeed, the situation of respondent would be laughable if it were not for the element of injustice to petitioners involved.

In this case the Guardian Government finds itself in the position of having to assail a decision of its own court by which justice was denied petitioners in order to save itself from the serious consequences which the denial of justice entailed upon it, while petitioners, or respondent's wards, are in the position of assailing this most unjust decision which if allowed to stand would materially benefit them!

Obviously, for the reasons above stated, it would be to petitioners' advantage to have section 12 of the Act of August 15, 1894, held void. But counsel for petitioners will not stultify himself on the law by seeking to support the decision of the Court below. Nevertheless, although the Indian wards of the Nation are accustomed to the most egregious legal inconsistencies on the part of the Guardian Government, it is doubtful if ever before they have been in a more anomalous legal position, or have found a greater opportunity for the indulgence of a keen sense of humor which exists in them despite their dignity and reserve.

II.

The Decision of the Court of Claims Confused, Inconsistent, and Contrary to Existing Law.

The decision of the Court below at least concedes to petitioners the right to take stone from the Pipestone

quarries, and that right is in all respects similar to a mineral claim.

It has been held repeatedly that the location of a mineral claim in compliance with statutory requirements has the effect of a grant from the Government. Gwillim *v.* Donellan, 115 U. S., 45; Forbes *v.* Gracey, 94 U. S., 762; Belk *v.* Meagher, 104 U. S., 279; Sullivan *v.* Iron Silver Min. Co., 143 U. S., 43; Manuel *v.* Wolff, 152 U. S., 505.

This being so the decision of the Court of Claims which limits the right of petitioners to the exclusive and unrestricted use of taking of stone from the quarries on the reservation, and denies to them the exclusive use of the reservation, is contrary to the existing law of the United States, since where the exclusive right to take minerals from land exists the concurrent right exists to the exclusive possession and enjoyment of the surface.

In Noyes *v.* Mantle, 127 U. S., 348, 351, it was held:

> "Section 2322 of the Revised Statutes, reenacting provisions of the Act of Congress of May 10, 1872 (17 Stat., 91), declares that the locators of mining locations previously made or which should thereafter be made, on any mineral vein, lode, or ledge on the public domain, their heirs and assigns, where no adverse claim existed on the 10th day of May, 1872, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, so long as they comply with the laws of the United States, and with state, territorial, and local regulations, not in conflict with

those laws governing their possessory title. There is no pretense in this case that the original locators did not comply with all the requirements of the law in making the location of the Pay Streak lode mining claim, or that the claim was ever abandoned or forfeited. They were the discoverers of the claim. They marked its boundaries by stakes, so that they could be readily traced. They posted the required notices, which were duly recorded in compliance with the regulations of the district. They had thus done all that was necessary under the law for the acquisition of an exclusive right to the possession and enjoyment of the ground. The claim was thenceforth their property. They needed only a patent of the United States to render their title perfect, and that they could obtain at any time upon proof of what they had done in locating the claim, and of subsequent expenditures to a specified amount in developing it. Until the patent issued the government held the title in trust for the locators or their vendees. The ground itself was not afterward open to sale."

The inconsistency of the decision of the Court below and the soundness of the rule stated in Noyes *v.* Mantle, *supra,* in its application to the facts in the instant case, are manifest:

The Yankton Sioux, numbering about 2,000 souls, reside upon a reservation in South Dakota, far removed from the Pipestone Reservation in Minnesota. The exclusive and unrestricted right to take stone from the Pipestone Quarry, and to use the quarry as they had been wont to do for ceremonial purposes so long

as they desired, without the concurrent exclusive right to occupy the surface of the quarry, or the reservation, so long as they desired to do so for the purposes mentioned, would be a meaningless thing. They could not take stone from the quarry pits without visiting the reservation on which the pits were located, and they could not confine themselves to the quarry pits as distinguished from the reservation while visiting the same for the purpose of obtaining pipe stone and holding ceremonials. To deny them the exclusive use of the reservation so long as they desired to use it, would necessarily then be but to deny them the exclusive use of the quarry which constituted the reservation, for plainly, they could not enjoy the free and unrestricted use of the quarry, since by reason of their nature a place for them to dwell while taking stone was necessary, unless they also had the right to the free and unrestricted use of the reservation. It was for this reason, and no other, that Article VIII of the treaty of 1858, in conferring on them the free and unrestricted use of the quarry, imposed on the United States the obligation to keep the reservation open and free to their use.

III.

Respondent is Bound by the Mutual Constructions Placed on the Treaty of 1858 by the Parties Thereto.

It is a familiar and well settled rule of construction applicable to treaties that a practical and common construction of the terms of a treaty by the parties through proper representatives shortly after its con-

clusion is quite conclusive as to their meaning. United States *v.* Texas, 162 U. S., 1; Opinion of U. S. Members of the Alaska Boundary Tribunal of 1903; Treaties, Their Making and Enforcement, Crandall, Sec. 167, p. 383.

In this case there have been numerous mutual constructions of the treaty of 1858.

The United States being the guardian of the Indians, the duty devolves upon the Government in the discharge of its trust to take such action as may be necessary to prevent injury to its wards and their property. United States *v.* Beebe, 127 U. S., 338; United States *v.* Minnesota, decided March 1, 1926.

In the discharge of its duty as interpreted by it, the Government had never hesitated prior to 1884 to institute proceedings to set aside patents to Indian lands illegally granted by the Secretary of the Interior. Leavenworth, etc., R. Co. *v.* U. S. (1875), 92 U. S., 733; United States *v.* Cook (1873), 19 Wall., 591.

Thus, in 1884, at the instance of the United States itself, this Court set aside a patent to a tract of land in the Pipestone Reservation, in the case of United States *v.* Carpenter, 111 U. S., 435.

Plainly, if the Government had not deemed petitioners entitled to an exclusive right to the use of the surface of the reservation as distinguished from a mere easement in the land, it would not have instituted and pressed a suit to vacate its own patent.

Consistent with its then construction of the treaty, in 1887 the Government employed United States troops to remove intruders upon the reservation who were

officially declared to be trespassers, not upon the quarries, but upon the reservation.

By the Act of March 2, 1889 (25 Stat., 1012), Congress directed the value of the "Red Pipestone Indian Reservation"—not merely the privilege of taking stone from the quarry thereon—to be appraised, including the actual value of the strip of land across the reservation then occupied by the Cedar Rapids, Iowa Falls and Northwestern Railway Company, "as well as the damage to the balance of the lands of said reservation by reason of the taking and occupancy of said strip for railroad purposes; * * *."

The appraisement was made, and the sum of $1,740, collected by the Secretary of the Interior from the Railroad Company thereunder, was paid over to petitioners.

Could anything have been a clearer recognition by both parties of the exclusive right of petitioners to the use of the Pipestone Reservation as distinguished from the mere right to take stone from quarries located thereon?

Again, by the Act of February 16, 1891 (26 Stat., 764), the Secretary of the Interior was directed to acquire title to sufficient land in the Pipestone Reservation by purchase, or condemnation, or otherwise, on which to erect a governmental institution.

If the Government had deemed the right of petitioners in the reservation limited to a mere easement, is it conceivable that Congress, necessarily acting upon the advices of the Government, would have deemed the purchase or condemnation of the land necessary?

It is submitted that such mutual constructions of the treaty of 1858 as those mentioned completely estop the United States from denying the right of petitioners to the exclusive right to the use and enjoyment of the surface of the Pipestone Reservation as well as the right to take stone from the quarries thereon.

IV.

The Right of Petitioners to the Land is Res Adjudicata, and the Decision of the Court of Claims is Incompetent to Overrule the Prior Decision of this Court in United States v. Carpenter, 111 U. S. 347.

From the most cursory reading of the opinion of the court below it is apparent that it was misled by the arguments of counsel for the United States into making a distinction between the Pipestone Quarries and the Pipestone Reservation, which the facts show are one and the same. Thus, as shown, in seeking to limit the right of petitioners to the use of the quarries, it wholly ignored the right expressly granted them in Article VIII of the treaty of 1858 to visit the Pipestone Reservation as long as they might desire. In so doing it not only ignored the facts, but the decision of this Court in United States *v.* Carpenter, 111 U. S., 347, and in so far as that case decided the rights of the petitioners in the reservation, its decision had the effect of overruling the prior decision of the Supreme Court.

The facts in United States *v.* Carpenter, *supra*, which fully appear in the decision, were as follows: In the execution of the treaty of April 19, 1858, the United

States caused so much of the quarry as appeared to be necessary and proper for the purposes of the reservation provided for to be surveyed and marked. A diagram and the field notes of the survey were duly returned, filed, and recorded in the General Land Office, and in the office of the Surveyor General of Minnesota. In February, 1860, copies of them were transmitted by the Commissioner of the General Land Office to the Surveyor General of the United States for that State, with instructions "to lay the same down" on the map of the State in his office, and to respect them when the public surveys reached the locality, by closing their lines upon the reservation. At this time the land included in the reservation was not surveyed; but afterwards, for some unexplained reason, and in violation of the instructions, it was surveyed with other public lands in its vicinity. In July, 1872, after this survey, the Commissioner directed the Surveyor General to locate the reservation on the official plat in his office, from the field notes and plat of the original survey, and to transmit authentic copies to the General and Local Land Offices; or, if it should be impossible to locate it from these data, to direct a resurvey of the tract, so that it might be located and described upon the official plats, and its boundaries respected in accordance with the treaty.

In pursuance of these instructions, the Surveyor General caused a resurvey of the quarry reserve, and immediately marked it upon the official plats in his office. Its boundaries as resurveyed correspond and are substantially coincident with the lines of the orig-

inal survey, and embrace the quarter section of land above described. Notwithstanding the reservation by the terms of the treaty and its survey, and appropriation to the purposes mentioned, one August Cluensen, on the 15th of July, 1871, was permitted by the land officers of the district to locate upon the quarter section a piece of land scrip issued under the authority of the laws of the United States, known as Louisiana Agricultural College scrip, and to enter the section at that office with this scrip. On the 15th day of May, 1874, a patent was issued to him pursuant to his entry. All the interest which he thus acquired, if any, was subsequently transferred, by divers mesne conveyances, to the defendant, Herbert M. Carpenter, who claimed to be the owner of the premises covered by the patent.

In the face of such facts—which are facts of record, in an adjudicated cause—there would seem to be no room whatever for argument that the parties to the treaty of 1858 did not deem the interest of petitioners coextensive with the reservation, or the reserved portion of the Red Pipestone Quarry, as distinguished from a right merely to take stone from such quarry pits as might exist on the reservation. Any such argument, however, has been rendered unavailing by the decision of this Court in the case in which the facts were established, by the following decision:

> "The action of the Government in causing the tract described to be marked on the official plats in the land offices as reserved from sale was clearly within the line of its duty under the

stipulations of the treaty. The bill alleges that the tract was a part of the Red Pipestone Quarry mentioned in the eighth article. After the treaty, until the survey was made, and the actual extent of the reservation was thus designated, no part of the land containing the quarry could have been taken up either by settlement or by location under the Louisiana Agricultural College scrip. The whole of such land was by the treaty withdrawn from private entry or appropriation until the Government had determined whether any portion less than the whole should be reserved. Its power of selection, if the whole was not retained, could not be restricted by the action of private parties. So, in any view which can be taken, the entry of Cluensen was void. It matters not whether the land had been surveyed or not, the treaty was notice that a part of the quarry would be retained by the Government, and that the whole might be, for the use of the Indians. This purpose and the stipulation of the United States could not be defeated by the action of any officers of the land department."

The decision of the court below limited the right of petitioners to the taking of stone from the quarries as distinguished from their right to the exclusive use of the land which the quarries constituted. But it is submitted that the right of petitioners, as well as the intent of the parties to the Treaty of 1858, to include more than the mere right to take stone from the quarries, had already been construed by the Supreme Court in 1884, since in Carpenter *v.* U. S., *supra*, their right to the exclusive use of the reservation had been decided.

That the decision of the Court of Claims, in conflict with the prior decision of this Court, was incompetent to curtail petitioners' rights, and must, therefore, be set aside, requires no further argument.

V.

The Treaty of April 19, 1858 (11 Stat., 743), Contained a Grant of a Profit a Prendre.

The question remains, what was the nature of the right which petitioners acquired in the Pipestone Reservation under the Treaty of 1858?

It is impossible for petitioners to have acquired any right in real property that is incapable of definition in the law.

In the body of its opinion the court below said:

> "The Treaty of 1858 embraced the Pipestone Quarries, but from time immemorial the Sioux had enjoyed a common privilege of visiting the quarries and taking therefrom sufficient stone for pipes and Indian ceremonials. Article VIII of the treaty reserved to the Indians this ancient privilege. Manifestly, it was at the time, and may now be, a right of value and importance; at least the Yanktons so appraised and the Government recognized it. The right and privilege, however, was not akin to the right of occupancy, the recognized Indians' tribal title. It was in the nature of an easement. * * *"

Thus, the court below was content with the indefinite declaration that the right of petitioners was "in the nature of an easement."

Beyond this it did not attempt to define the right it conceded to petitioners because, plainly, it was treading on dangerous ground, in that a further definition would cause a conflict between its opinion and its decision that petitioners only had the right to take stone from the quarry and not to the use of the reservation. Therefore, it simply left them "up in the air." Had it pressed its legal enquiry to a logical conclusion and actually defined the right of petitioners with precision, its decision, on its face, would have appeared to be a *non-sequitor* in the law.

From that portion of the opinion above quoted, it is plain, however, that petitioners' right was more than an easement.

An easement can only exist where there are two estates, one dominant and the other servient. Hill *v.* Lord, 48 Me., 96; Hall *v.* Ionia, 38 Mich., 498; Leyman *v.* Abeel, 16 Johns (N. Y.), 30; Pierce *v.* Keator, 70 N. Y., 421; Huntington *v.* Asher, 96 N. Y., 604; Grubb *v.* Grubb, 74 Pa. St., 33.

Article VII of the Treaty of 1858 did not create a dominant and a servient estate, but merely an exclusive right in petitioners, and it is submitted that that right was nothing less than the common law right of profit *à prendre.*

> "The right to profits, denominated profit *à prendre,* consists of a right to take a part of the soil or produce of the land in which there is a supposable value. Thus, the right to hunting, fishing, or shooting on the land of another, accompanied by the right to keep part or all of the game killed or fish taken; the right to take

> gravel, stones, sand or a part of the soil of another's land; the right to take seaweed from another's land; and the right to take wood or timber from the land of another are profits *à prendre.*" Amer. and Eng. Ency. of Law, Vol. 23, p. 186.

See, also, Bouvier's Law Dictionary, Vol. 3, p. 2736, and authorities there cited; and especially Black *v.* Min. Co., 49 Fed., 549; Washburn on Easements, 11; Engel *v.* Ayer, 85 Me., 448, 27 Atl., 352; Pierce *v.* Keator, 70 N. Y., 419, 26 Am. Rep., 612; Merwin *v.* Wheeler, 41 Conn., 25; Perley *v.* Langley, 7 N. H., 233; Texas, etc., R. Co. *v.* Durrett, 57 Texas, 52.

Profits à prendre differ from easements in that the former are rights of profit, and the latter are mere rights of convenience without profit. Hall on Profits à Prendre, 1; Gale on Easements; Littlefield *v.* Maxwell, 31 Me., 134, 50 Amer. Dec., 653; State *v.* Wilson, 42 Me., 28; Boatman *v.* Lasley, 23 Ohio St., 614; Huff *v.* McCauley, 53 Pa. St., 206; Cadwalader *v.* Bailey, 17 R. I., 500.

Moreover, profits *à prendre* are acquired by grant, or by prescription, and never as an easement may be, by mere custom. Nudd *v.* Hobbs, 17 N. H., 425.

In the instant case petitioners did not acquire their right by custom, but by a specific grant, the treaty of 1858 being a grant. Jones *v.* Meehan, 175 U. S., 1, 10; Doe *v.* Beardsley, 2 McLean, 417, 418; Mitchell *et al. v.* United States, 9 Pet., 711, 748; Doe *v.* Wilson, 23 How., 457, 463; Crews *v.* Burcham, 1 Black., 356; Holden *v.* Joy, 17 Wall., 211, 247; Best *v.* Polk, 18 Wall., 112, 116; The New York Indians *v.* United States, 170 U. S., 1.

Inasmuch as petitioners acquired a right of profit *à prendre* in the Pipestone Reservation, the decision of the Court below is necessarily erroneous, for where the right of *profit à prendre* belongs to persons distinct from ownership in other lands, it takes the character of an interest or estate in the land itself rather than that of a proper easement, and may be held in fee, for life, or for years. Washburn on Easements (4th Ed.), 80; Goodrich *v.* Burbank, 12 Allen (Mass.), 461; Huff *v.* Macauley, 53 Pa. St., 210; Tinicum Fishing Co. *v.* Carter, 61 Pa. St., 21.

And by every authority it is an incorporeal hereditament. Cheltham *v.* Williamson, 4 East., 469.

The right of *profit à prendre* which petitioners acquired under the treaty of 1858 is in every way consistent with the decision in United States *v.* Carpenter, *supra,* which confirmed in them not only the exclusive right to take stone from the Pipestone Quarry, but the exclusive right to the possession and enjoyment of the reservation. In fact, it flows as a necessary consequence of that decision.

VI.

The Right Acquired by Petitioners Under the Treaty of 1858 Enlarged by the Agreement of 1892 as Ratified by the Act of 1894.

Not only has the right of *profit à prendre* granted petitioners in the treaty of 1858 never been diminished, but their title to the Pipestone Reservation was enlarged by the Executive Agreement of December 31,

1892, as ratified by the Act of August 15, 1894 (28 Stat., 286).

Article XVI of the said agreement, which is section 12 of the said Act, is as follows:

> "If the Government of the United States questions the ownership of the Pipestone Reservation by the Yankton Tribe of Sioux Indians under the treaty of April 19, 1858, *including the fee to the land, as well as the right to work the quarries,* the Secretary of the Interior shall as speedily as possible refer the matter to the Supreme Court of the United States to be decided by that tribunal. And the United States shall furnish, without cost to the Yankton Indians, at least one competent attorney to represent the interest of the tribe before the Court. *If the Secretary of the Interior shall not, within one year* after the ratification of the agreement by Congress, refer the question of ownership of the said Pipestone Reservation to the Supreme Court as provided for above, *such failure upon his part shall be construed as and shall be waiver by the United States* of all its rights to the ownership of *the said Pipestone Reservation, and the same shall thereafter be solely the property of the Yankton Tribe of Sioux Indians* including the fee to the land." (Italics added.)

At the very outset it is necessary to define the nature of the grant made to petitioners by the Act of August 15, 1894.

It is obvious from the terms of the Act that the title to the fee was to vest in petitioners on August 15, 1895, if the Government of the United States did not "ques-

tion" their ownership prior to that date. In other words, the failure of the Government to question their ownership within the time allowed was a condition precedent to the vesting of the title to the fee in them.

In Raley *v.* Umatilla County, 15 Ore., 179, 3 Amer. St. Rep., 142, it was said:

> "Conditions precedent are, as the term implies, such as must happen before the estate dependent upon them can arise or be enlarged, while conditions subsequent are such as when they do happen defeat the estate" (2 Washburn on Real Property, p. 3, sec. 2).
>
> "To create a condition in a grant, apt and appropriate words ought to be used, such as 'on condition,' 'provided always,' 'if it shall so happen,' or 'so that the grantee pay,' etc., 'within a specified time' and the like. Therefore, 'the grant of a lot of land to set a meeting house thereon,' does not imply a condition. And an estate upon condition can not be created by deed, except where the terms of the grant will admit of no other reasonable interpretation. Therefore, reciting, in a deed that it is in consideration of a certain sum, and that the grantee is to do certain things is not an estate upon condition, not containing a clause of re-entry or forfeiture. And yet these words may create a condition *if a right of re-entry is reserved* in favor of the grantor in case of failure to carry out the intention thus expressed." (2 Washburn on Real Property, pp. 4 and 5.)

And in Winthrop *v.* McKim, 51 N. Y., 321, it was said:

> "The distinction between conditions precedent and subsequent seems to be this:
>
> "Conditions precedent are such as must happen or be performed before the estate can vest.
>
> "Conditions subsequent are such as when they happen or are performed as the case may be, devise, curtail or abridge an estate already vested."

In Raley *v.* Umatilla County, *supra,* it was also said:

> "An estate upon condition is one which is made to vest, to be enlarged or defeated, upon the happening or not happening of some event."

The doctrine of estates upon condition was fully recognized in Adams *v.* Oregon Knob Copper Co., 4 Hughes (U. S.) 593, 7 Fed., 638. As declared in Seth Laberee *v.* Carleton, 53 Maine, 211, it is fully discussed in Rawson *v.* Inhabitants of School District No. 5, 7 Allen, 125; 89 Mass., 125.

In the instant case the Secretary of the Interior submitted the question of the ownership of the "Pipestone Quarry Reservation" to the Department of Justice, and was advised that it was "impracticable" to comply with section 12 of the Act of August 15, 1894, whereupon he did not refer the question to the Supreme Court within one year after August 15, 1894. But the mere reference of the matter by the Secretary of the Interior to the Attorney General for interdepartmental advice did not constitute a "questioning" of the ownership of the reservation by the Government, since there is no evidence to show that petitioners were

cognizant in any way of such action. Certainly those who were to be affected by the result of such an inquiry had no opportunity to be heard.

Thus, since the Government did not "question" their ownership within the plain meaning of the Act of August 15, 1894, for that reason petitioners must be deemed to have acquired a fee simple upon condition under the grant contained in the Act.

In the opinion of the court below it was said:

> "Article XII of the treaty of 1892, ratified by section 12 of the act of August 13, 1894, 28 Stat., 286, 314, 317, 319, in nowise constitutes a recognition of title to lands in question in the Indians. What the legislature covers is a mere grant of authority and discretion to determine the validity of the Indians' persistently asserted claim to the lands. The terms of this estate are *sui generis*. Manifestly, it imposed upon the Secretary of the Interior a duty it was impossible under the law to discharge. The Secretary was powerless to invoke the jurisdiction of the Supreme Court under the law, and the imposition of duty without the added provisions indispensable to its performance was beyond the power of Congress in this respect. This Court was confronted with a similar situation in the case of Muskrat *v.* United States, 219 U. S., 346. * * *"

As pointed out hereinbefore, it would be a distinct advantage to have this view sustained, but to repeat, counsel for petitioners will not stultify himself by supporting a view of the law which is plainly in error.

The court below placed the entire emphasis upo the condition that the question of ownership could no be referred to the Supreme Court by the Secretary o the Interior. It lost sight of the fact that the duty wa imposed upon the Secretary of the Interior to refe the matter to the Supreme Court only "if the Govern ment of the United States questions the ownership o the Pipestone Reservation."

Obviously, should the Government not question th ownership, and this it did not do, no other condition required to be fulfilled to cause the title to the fee t vest in the petitioners.

The instant case is clearly distinguishable from the Muskrat case which arose under an act of Congress undertaking to confer jurisdiction upon the Court of Claims, and upon the Supreme Court, on appeal, to determine the validity of certain acts of Congress. In that case there was no legal controversy and the purpose of the proceedings instituted in the Court of Claims was to restrain the enforcement of legislation upon the ground that the same was unconstitutional and void. The Court of Claims sustained the validity of the acts and dismissed the petitions. Upon appeal the Supreme Court held that the jurisdictional act could not be taken to intend to confer jurisdiction on the Court of Claims separately considered to pass on the constitutionality of an act of Congress and, therefore, reversed the judgment of the Court of Claims and remanded the case to that court with directions to dismiss the petition for want of jurisdiction.

Said this Court:

"This attempt to obtain a judicial declaration of the validity of the act of Congress is not presented in a 'case' or 'controversy,' to which, under the Constitution of the United States, the judicial power alone extends. It is true the United States is made a defendant to this action, but it has no interest adverse to the claimants. The object is not to assert a property right as against the Government, or to demand compensation for alleged wrongs because of action upon its part. The whole purpose of the law is to determine the constitutional validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the Government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question. Such judgment will not conclude private parties, when actual litigation brings to the court the question of the constitutionality of such legislation. In a legal sense the judgment could not be executed, and amounts in fact to no more than an expression of opinion upon the validity of the acts in question. Confining the jurisdiction of this court within the limitations conferred by the Constitution, which the court has hitherto been careful to observe, and whose boundaries it has refused to transcend, we think the Congress, in the Act of March 1, 1907, exceeded the limitations of legislative authority, so far as it required of this court action not judicial in its nature within the meaning of the Constitution."

In the instant case the power of Congress to enlarge the constitutional jurisdiction of the Supreme Court by imposing upon it a non-judicial function is not involved. The Act of August 15, 1894, expressly provided that in the event petitioners' title to the Pipestone Reservation were questioned by the Government not only should the matter be referred to the Supreme Court for a decision but that the United States should furnish counsel to represent the interest of petitioners before the court. The express provision that counsel be provided to represent the interest of petitioners precludes the idea that the matter to be referred to the Supreme Court was not to be presented to it in the form of a legal controversy. The act is not invalid, therefore, because violative of the rule laid down in the Muskrat case.

Is the act invalid for some other reason?

"Manifestly," said the court, "it imposed upon the Secretary of the Interior a duty it was impossible under the law to discharge." The court, without specifying why it was impossible for the duty to be discharged, then went on to say that "the Secretary was powerless to invoke the jurisdiction of the Supreme Court under the law, and the imposition of duty without the added provisions indispensable to its performance was beyond the power of Congress in this respect."

It may be that this conclusion that the Secretary of the Interior was powerless to invoke the jurisdiction of the Supreme Court under the law was based on the erroneous interpretation of section 12 of the Act of August 15, 1894, that Congress had sought without

constitutional power to enlarge the original jurisdiction of the Supreme Court.

The rules of interpretation that a statute must be so construed when possible as to carry out the intent of Congress, and that as between an interpretation that will render a statute of no effect and one that will render it effective, the latter is to be preferred, require no citation of authority in their support.

It is submitted that it is quite possible to so interpret the statute of August 15, 1894, as to carry out the plain intent of Congress.

In the first place, it was not mandatory under the statute that the Government should question the title of petitioners, nor that the Secretary of the Interior should refer "the matter" to the Supreme Court. The act, by its terms, merely provided that "*if* the Government questions the ownership of the Pipestone Reservation by the Yankton Tribe of Sioux Indians under the treaty of April 19, 1858, * * * the Secretary of the Interior shall, as speedily as possible, refer the matter to the Supreme Court of the United States to be decided by that tribunal." (Italics added.)

Thus, it is seen that the act left it wholly discretionary with the Government whether it would or would not question petitioners' title. It was only in the event that the Government questioned the title that the Secretary of the Interior was called upon to act, it being provided that if he failed to do so the title to the fee in the Pipestone Reservation should be deemed to be quieted in petitioners. In other words, if the Government should fail to question the title of petitioners be-

fore August 15, 1895, the fee was to vest in petitioners whether or not they possessed the same prior to that date. The facts show that the title was never questioned.

There is nothing peculiar about such a statute.

R. S. 1069 provides that no claim against the United States may be entertained by the Court of Claims unless the same is filed within six years from the time the cause of action upon which the claim is based arose.

In *Boteller* v. *Dominquez*, 130 U. S., 238 (1889), this Court held that under the Act of March 3, 1853, no title to land in California, under Spanish or Mexican grants, should have any validity unless submitted to the Commission created by that act within two years, and confirmed by it or if rejected, confirmed by the District or Supreme Court of the United States. See also, *Barker* v. *Harvey*, 181 U. S., 481.

Statutes such as these containing limitations upon the time within which a claim may be asserted, or in the alternative be barred forever, are no more nor less than statutes of limitations, and it is obvious that if Congress can raise the bar of such statutes against others, it can raise it against the Government of the United States with the same object in view—to quiet disputes or titles.

In the second place, it is to be observed that Section 12 of the act did not require the Secretary of the Interior to institute a suit in the Supreme Court in the event the petitioners' title were questioned. It merely required that the matter of any dispute over petitioners' title which the Government might raise, should

be *referred* to the Supreme Court. This was not impossible. Ample machinery to accomplish such a reference existed. The mere fact that the Department of Justice held such a reference to be impracticable did not make it impossible. Among other ways, the question could have been raised by the Government in an injunction proceeding in the United States District Court. The slightest co-operation between the attorney for the Government and the attorney required to be appointed to represent petitioners would have enabled the matter to be referred to the Supreme Court on appeal within a year from August 15, 1894. The findings of fact are conclusive that no practical attempt was made to refer the matter to the Supreme Court by the utilization of the existing legal machinery. Yet, it was just such a contingency that Congress had in mind. If the Government failed to avail itself of the means at hand to question the title of petitioners and to have the matter in controversy referred, within a year, to the Supreme Court for a final decision, the title was to be quieted in petitioners.

On this point the parties to this controversy would seem to be in entire accord. In the brief of respondent on the petition for writ of certiorari, it was said at page 7:

> "The provision for referring the question to the Supreme Court for decision did not necessarily mean that the Supreme Court should be asked for an advisory opinion outside of a litigated case. It is susceptible of the interpretation that it contemplated bringing the question before the Supreme Court in a constitutional

way. If existing legislation did not permit it, the United States, which was one of the parties to the agreement, could have enacted legislation granting to some District Court of the United States jurisdiction to entertain a suit by the United States against the Sioux Indians to quiet the title to this quarry or determine the adverse claims of the Indians in it, with the right of appeal to the Supreme Court. As the enactment of valid legislation, enabling the Government to obtain a decision of the Supreme Court, was wholly within the control of the United States, and the length of time allowed to accomplish that result was within its control, being dependent on the date of its ratification of the agreement, it is not entirely clear that the failure of the United States to bring about a lawful submission of the controversy to the Supreme Court is a reason for declaring inoperative the other provisions of Article XVI of the agreement. Furthermore, even if the condition respecting submission of the controversy to the Supreme Court was wholly inoperative and ineffective and incapable of execution, that was a matter which the United States would be well informed about when it made the agreement and ratified it; and if it agreed to grant absolute title to the Indians unless it did procure a decision from the Supreme Court, its inability to procure such a decision may well be said to have no effect to prevent the vesting of title under the other paragraph of Article XVI. Senate Report 3316, 57th Cong., 2nd Sess."

But even if it had been impossible to refer the matter of a dispute over petitioners' title to the Supreme

Court within a year from August 15, 1894, the statute would not be invalid. Section 3 of Article IV of the Constitution provides as follows:

> "The Congress shall have the power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *."

It is submitted that under this provision Congress could impose any condition it saw fit with respect to the vesting of title in petitioners, and that if it were impossible for the Government to litigate its claim to the land in question in the Supreme Court within a year, Congress still had the right to declare that if the matter were not referred to the Supreme Court within that time title should vest in petitioners.

The condition imposed by Congress that petitioners should have the fee unless a dispute over title were referred to the Supreme Court within a year was simply a condition precedent to the vesting of title in petitioners by stautory grant; the failure of the Government to refer the matter to the Supreme Court prior to August 15, 1895, was but a fulfillment of the condition.

In *De La Croix* v. *Chamberlain*, 12 Wheat., 599, it was said:

> "The duty to settle private land claims and rights of inhabitants within ceded territory belongs to the political department of the Government, and Congress may discharge such duty or delegate it to the judiciary."

The foregoing language was quoted in *Barker* v. *Harvey*, 181 U. S., 487:

> "The duty of providing the mode of securing the private rights of property within the territory ceded by Mexico to the United States, and of fulfilling the obligations imposed upon the United States by the treaties, belongs to the political department of the Government, and Congress may either itself discharge the duty or delegate it to the judicial department."

See also *Stoneroad* v. *Stoneroad*, 158 U. S., 240. Cited in *Ainsa* v. *New Mexico & A. R. Co.*, 175 U. S., 79; 44 L. Ed., 80; 20 Sup. Ct. Rep., 28.

VII.

The Agreement of 1892 and Act of 1894 Can be Given but One Construction.

In its interpretation of the Act of August 15, 1894, the court below completely ignored the fact that section 12 thereof was but a ratification of Article XVI of the Agreement of December 31, 1892, or an agreement with Indians. It is that agreement, and not the mere act of ratification, that is required to be interpreted.

In *Worcester* v. *State of Georgia*, 6 Peters, 515, 582, this Court said:

> "The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their

> plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."

How the words of the treaty were understood by petitioners plainly appears from the opinion of the Court of Claims, in which it was declared that their claim to the land constituting the reservation, as well as to the right to work the quarries, was "persistently asserted" (Record, p. 29).

In Choctaw Nation *v.* United States, 119 U. S., 1, this Court said:

> "The recognized relation of the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons equally subject to the same laws.

> "The rules to be applied in the present case are those which govern public treaties, which, even in controversies between nations equally independent, are not to be read as rigidly as documents between private persons governed by a system of technical law, but in the light of that larger reason which constitutes the spirit of the law of nations. And it is the treaties made between the United States and the Choctaw Nation, holding such a relation, the assumptions of fact and of right which they presuppose, the acts and conduct of the parties under them, which constitute the material for settling the controversies which have arisen under them."

See also The Kansas Indians, 5 Wall., 737; The New York Indians, 5 Wall., 752; Chew Heong *v.* U. S., 112 U. S., 536, 541; Hanenstein *v.* Lynham, 100 U. S., 483, 487; United States *v.* Choctaw Nation, 179 U. S., 494; Winters *v.* United States, 207 U. S., 564; United States *v.* Payne, 264 U. S., 446.

Moreover, even acts that affect Indian property are to be liberally construed in favor of the Indians, and construed most strongly against the United States. Leavenworth, etc., R. Co. *v.* United States, 92 U. S., 733; Elk *v.* Wilkins, 112 U. S., 94; United States *v.* Nice, 241 U. S., 591; Missouri, Kansas & Texas Ry. Co. *v.* Roberts, 152 U. S., 114, 119; Scott *v.* Carew, 196 U. S., 100.

In the face of such authorities it is little short of absurd to argue that the careless verbiage and phraseology of the guardian Government itself is to be construed in such way—is to be given such technical legal

import—as to render an act of Congress void that had but one purpose which was manifest on its face—to ratify an agreement with the Indians.

Thus, it is utterly immaterial whether it was within the power of the Secretary of the Interior to refer the dispute to the Supreme Court within a year on account of the fact that the Supreme Court, under the rule in the Muskrat case, or any other case, had no jurisdiction to entertain such a reference, since the agreement of 1892 must be construed in accordance with the intent of the parties as determined not by that of the United States but by the understanding of the Indians.

What possible understanding could "unlettered" Indians have had of the technical legal import of the word "refer" in relation to the presentation of a controversy to the Supreme Court, as distinguished from the undoubted intent of the parties to have their title adjudicated within a year, or end the existing dispute in favor of the Indians?

Even today, the "tutored counsel" of the United States—the Solicitor General himself—gives to the word "refer" the meaning which the Indians gave to it in 1892.

Abandoning the realm of interpretation which equity has set apart to their agreements, petitioners will now invade respondent's own sphere of strictly legal construction in which to interpret the agreement of 1892. In this sphere no special consideration for the Indian wards of the United States need be invoked.

> "We are not at liberty to ascribe a meaning to the terms of a treaty which would frustrate the known and proved purpose of the instrument, unless the words used in the instrument are such as to permit of no other construction. Whoever asserts a construction which would produce such a result must show not merely that it is a possible construction, but that it is a necessary construction, and that any other is impossible." (Opinion of Elihu Root, Henry Cabot Lodge and George Turner, U. S. members of the Alaskan Boundary Tribunal of 1903, S. Doc. No. 162, 58th Cong., 2d Sess., I, 53; Treaties, Their Making and Enforcement, p. 371.)
>
> "The whole document will be taken together, and will be considered in connection with the attendant circumstances, the situation of the parties, and the object in view, and thus the literal meaning of an isolated clause is often shown not to be the meaning really understood or intended." (Mr. Phelps, Am. Minister to Lord Roseberry, June 2, 1886, S. Doc. No. 870, 61st Cong., 3rd Sess., III, 778; Crandall *Ibid*, p. 371; Vattel, Bk. II, c. XVII, Sec. 287.)

The rule stated was adopted by this Court in *In re Ross*, 140 U. S., 453, 475. In that case Mr. Justice Field said:

> "To some terms and expressions a literal meaning will be given, and to others a larger and more extended one. * * * The enquiry in all such cases is as to what was intended in the law by the legislature, and in the treaty by the contracting parties. * * *"

So too, it has been held by this Court that in case of ambiguity or doubt in the application of a treaty, reference is frequently made to the contemporaneous declarations of the negotiators who framed the treaty, and prior negotiations, not to make a treaty where the parties have failed to do so, nor to change the terms of the treaty technically made, but to determine the general object of the negotiations, the particular sense in which the terms, otherwise uncertain of application, were used at the time, or the conditions as they existed at the time of the conclusion of the treaty. Brawley *v.* United States, 96 U. S., 168, 173; Simpson *v.* United States, 199 U. S., 397, 399; United States *v.* Bethlehem Steel Co., 205 U. S., 105, 118.

The record in this case shows that the undoubted purpose of both parties to the agreement of 1892 was to terminate a dispute of long standing by affording the United States one year in which to establish a superior title to petitioners, and upon its failure to do so within that time, to raise a statutory bar against the assertion by the Government of any claim which the United States might have. Under the rules stated that object is not to be defeated by construing the word "refer," which was employed in the Act of 1894, in such a literal way as to preclude the meaning that the act imposed on the Secretary of the Interior the duty of instituting legal proceedings within a year in a constitutional way. It is not to be presumed that Congress intended to do a futile thing.

To repeat, a practical and common construction of the terms of a treaty, or agreement, by the parties

through proper representation shortly after its conclusion, is conclusion as to their meaning. United States *v.* Texas, 162 U. S., 1; Crandall, *Ibid.*, p. 383.

In this case, shortly after the passage of the Act of August 15, 1894, the United States entered into a new agreement with petitioners through duly authorized representatives of both parties on October 2, 1899, pursuant to the Act of June 7, 1897 (30 Stat., 87), in which petitioners agreed to accept $100,000 for their interests in the Pipestone Reservation, and upon that agreement a favorable report was rendered by the Senate Committee on Indian Affairs on April 4, 1906.

Is it conceivable that such actions would have been taken had the Government not construed the Act of August 15, 1894, to have vested in petitioners the ownership of the land?

VIII.

Under the Decision of the Court of Claims the United States is Liable Under the Act of June 3, 1920.

If petitioners are in error in their analysis of the decision of the court below, and the agreement of December 12, 1892, is in fact void because section 12 of the Act of 1894 was incompetent to ratify it, it follows that they not only retained their original right of *profit à prendre* in the Pipestone Reservation, but title to all the lands which they attempted to cede by the void agreement of 1892. This was conceded by respondent in its brief on the petition for the writ of certiorari, at p. 9, in the following language:

> "The difficulty here is that, by the same reasoning, the *whole* of the agreement of 1892 would have to be considered inoperative because of the failure of one essential provision of it, and since, by other provisions of the agreement, Indian lands were sold to the United States which have since been disposed of by it, a complete abrogation of the agreement of 1892 for failure of part of it is impossible."

Assuming that the agreement of 1892 is void, it follows that the Court of Claims, in finding no liability on the part of the United States, ignored utterly the mandate of the jurisdictional act of June 3, 1920 (41 Stat., 738).

This it sought to explain by assuming to deal with the claim before it as if it were cognizable only under the more limited act of January 9, 1925 (43 Stat., 730), which only empowered it to hear and determine the amount due petitioners, if any, for the Pipestone Reservation.

But this claim was not filed under the Act of June 3, 1925, as must be apparent from the fact that it was filed September 30, 1924,—over three months before that act was passed.

The claim was filed under the more general jurisdictional act of June 3, 1920, within which was included the more limited act of January 9, 1925, the latter being in nowise in conflict with it.

The Act of June 3, 1920, under which this claim was filed provided for the filing of "all claims of whatsoever nature which the Sioux Tribe of Indians may

have against the United States," and jurisdiction was expressly conferred upon the Court of Claims "to hear and determine all legal and equitable claims, if any, of said tribe against the United States, and to enter judgment thereon."

Moreover, the Act of June 3, 1920, required the Court of Claims to determine "the amount, if any, due" the claimants from the United States "under any treaties, agreements, or law of Congress, or for the misappropriation of any of the funds or lands of said tribe or band or bands thereof, or for the failure of the United States to pay said tribe any money or other property due."

And it expressly provided for the filing of claims by bands of the Sioux Tribe separately.

The Yankton Sioux, or the petitioners, having been found by the Court of Claims in the case of The Yankton Sioux *v.* The United States, Case No. 31,253, to be a band of the Sioux Tribe, nothing is more plain than that they were not limited in the claim herein to a recovery under the Act of January 9, 1925, or for the taking of the Pipestone Reservation alone.

That the former act conferred jurisdiction on the Court of Claims to hear and determine this claim was recognized by respondent which filed no demurrer to the petition, but pleaded the general traverse.

Moreover, the Court will take judicial notice of the fact that other claims were filed by petitioners under the same act to which no demurrer has been filed and to the merits of which respondent is now pleading.

If, then, the Act of August 15, 1894 is void, as held

by the Court of Claims, since the agreement of December 31, 1892 was necessarily void in consequence of non-ratification, it was the duty of the Court of Claims to determine what amount was due petitioners for the lands which they attempted to cede to the United States by the void agreement, and which, as admitted by respondent, have been taken and patented by the United States to *bona fide* purchasers without its having extinguished the petitioners' title thereto.

In the first place, it was beyond the power of the Government to give a valid title against the Indians to those lands since petitioners' title thereto was not extinguished. Leavenworth, etc., R. Co. *v.* United States, 92 U. S., 733; United States *v.* Cook, 19 Wall., 591; United States *v.* Carpenter, 111 U. S., 435; United States *v.* La Chapelle, 81 Fed., 152.

Grants by the United States are subject to the Indian title which can only be extinguished by their voluntary consent. Preston *v.* Browder, 1 Wheat., 115; Danforth *v.* Thomas, 1 Wheat., 155; Danforth *v.* Wear, 9 Wheat., 673; Clark *v.* Smith, 13 Pet., 195; Beecher *v.* Wetherby, 95 U. S., 517; Buttz *v.* Nor. Pac. R. R. Co., 119 U. S., 55; Minnesota *v.* Hitchcock, 185 U. S., 378.

It remained, therefore, to the Court of Claims, under its own decision, to determine what lands the Government had misappropriated and for which, as admitted by respondent, it is liable if the Act of August 15, 1894 is void.

These lands were generally described in Article I of the Agreement of December 31, 1892 (27 Stat., 633), which is as follows:

"The Yankton tribe of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said Indians as aforesaid."

The following public documents, of which the Court will take judicial notice, including the Proclamation of the President of May 16, 1895, and the schedule attached thereto, show that 151,692.04 acres were taken from petitioners under the agreement of 1892, and thrown open to settlement as part of the public domain:

"WHA C A. M.
2578-'95. 52063-1 K-2
L. & R. R. Div.

"DEPARTMENT OF THE INTERIOR,

WASHINGTON, *May* 17, 1895.

"The Commissioner of the
General Land Office.

"SIR: Adverting to your letter of March 20, last, transmitting the draft of a proclamation for the opening of the lands of the Yankton Indian Reservation, South Dakota, under the act of Congress approved August 15, 1894—28 Stat. 314-319—I now enclose a copy of the proclamation, which was signed by the President on May 16, 1895, and also return the schedule and map submitted with your above letter.

"The instructions to the Register and Receiver at Mitchell, relative to the disposal of the lands involved, which were approved and re-

turned to you with departmental letter of the 7th instant, were complete with the exception of the date of the proclamation and the date set therein for the opening of the lands to settlement.

"You are accordingly directed to instruct the local land officers, by telegraph, to insert in the instructions the date of the proclamation—May 16, 1895—and the date of the opening—May 21, 1895—to the end that the provisions of the act of Congress mentioned and the terms of the proclamation may be complied with.

"All papers involved in the opening of these lands, filed in this office since the matter has been pending, are also enclosed herein.

"Very respectfully,

"(Signed) HOKE SMITH,
"*Secretary.*"

"Enclosures 2 to 24 inc. rel. to State Sel. of Indemnity.

"School lands sent to Div. K (Mr. Barnes) JC.

"Enclosures 26 & 27 Printed Copies of Proclamation #26 given to Mr. Wahly.

"Enclosure 28 Diagram of Reservation given to Mr. Wahly."

C. "DEPARTMENT OF THE INTERIOR,

"GENERAL LAND OFFICE,

"WASHINGTON, D. C., *May* 17, 1895.

"Register and Receiver,
"Mitchell, South Dakota.

"GENTLEMEN: I have to call your attention to the proclamation of the President, dated May 16, 1895, * * * hereto attached, by which

the lands described * * * will be opened to settlement under the statutory provisions therein recited, at and after the hour of 12 o'clock, noon, central standard time, of Tuesday, the 21st day of May, 1895, being certain tracts embraced in the cession of the Yankton Tribe of Sioux Indians, by agreement ratified and confirmed by the twelfth section of the act of Congress approved August 15, 1894 (28 Stats., pp. 314 to 319).

"You will observe that it is stipuated in article 10 of the agreement referred to that—

"'Any religious society, or other organization now occupying under proper authority for religious or educational work among the Indians any of the land under this agrement ceded to the United States, shall have the right for two years from the date of the ratification of this agreement within which to purchase the land so occupied at a valuation fixed by the Secretary of the Interior, which shall not be less than the average price paid to the Indians for these surplus lands.'

"You will at the proper time be furnished with a copy of a 'schedule showing lands reserved for religious organizations, school, and agency purposes, etc., on the Yankton Reservation in South Dakota.'

"Any religious society or other organization applying to purchase lands under said article 10 must make proof, after six weeks' publication, of its occupancy of such lands on December 31, 1892, the date of the agreement, and pay for the same at the rate of $3.80 per acre, within two years from the date of the act ratifying the agreement.

"With regard to the lands described in the schedule, you will observe that the act referred to provides:

" 'That the lands by said agreement ceded to the United States shall, upon proclamation by the President, be opened to settlement, and shall be subject to disposal only under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common school purposes and be subject to the laws of the State of South Dakota: *Provided*, That each settler on said lands shall, in addition to the fees provided by law, pay to the United States for the land so taken by him, the sum of three dollars and seventy-five cents per acre, of which sum he shall pay fifty cents at the time of making his original entry and the balance before making final proof and receiving a certificate of final entry; but the rights of honorably discharged Union soldiers and sailors, as defined and described in section twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States, shall not be abridged except as to the sum to be paid as aforesaid.

"That the Secretary of the Interior, upon proper plats and description being furnished, is hereby authorized to issue patents to Charles Picotte and Felix Brunot, and W. T. Selwyn, United States interpreters, for not to exceed one acre of land each so as to embrace their houses near the agency buildings upon said reservation, but not to embrace any buildings owned by the Government, upon the payment by each of said

persons of the sum of three dollars and seventy-five cents.

"That every person who shall sell or give away any intoxicating liquors or other intoxicants upon any of the lands by said agreement ceded, or upon any of the lands included in the Yankton Sioux Indian Reservation as created by the treaty of April nineteenth, eighteen hundred and fifty-eight, shall be punishable by imprisonment for not more than two years and by a fine of not more than three hundred dollars.

"Each applicant to enter any of these lands as a homestead must have the qualifications required of any applicant for homestead entry under existing law. He must pay for the land entered at the time of making his original entry the sum of 50 cents per acre and at the time of making proof, whether under section 2291 or 2301, Revised Statutes, the further sum of $3.25 per acre in addition to the fees now required by law. No final commission will be collected where the party submits proof under section 2301, Revised Statutes, and the commissions in the original entry and in final entry under section 2291, Revised Statutes, will be computed at the rate of $1.25 per acre, the ordinary minimum price of public lands under the general provisions of section 2357, United States Revised Statutes. (See sections 2238 and 2290, United States Rev. Stats.)

"It is stipulated by article 8 of the agreement, that the ceded lands shall be disposed of 'to actual and bona fide settlers only,' while the act ratifying the agreement provides that 'the rights of honorably discharged Union soldiers

and sailors, as defined and described in sections 2304 and 2305 of the Revised Statutes of the United States, shall not be abridged.' No mention is made of sections 2306 and 2307 of the Revised Statutes, under which soldiers and sailors, their widows and orphan children are permitted, with regard to the public lands generally, to make additional entries, in certain cases, free from the requirement of actual settlement on the entered tract (see pages 23 and 24 of the General Circular of February 6, 1892). It is therefore held that additional entries can not be made for these lands under said sections 2306 and 2307, unless the party claiming will, in addition to the proof required on pages 23 and 24 of said circular, make affidavit that the entry is made for actual settlement and cultivation according to section 2291, as modified by sections 2301, 2304, and 2305, of the Revised Statutes, and the prescribed proof of compliance therewith will be required to be produced, and the additional payment will be required to be made before the issue of the final certificate.

"Townsite entries will be made for said lands in accordance with the general laws applicable thereto. (See Circular of July 9, 1886.)

"In addition to the usual original homestead receipt (form 4-137) for the fee and commissions, you will issue a receipt of form 4-140*a* for the purchase money paid when the original entry is made, and when the final payment is made, you will issue a receipt of like form in addition to the final homestead receipt (form 4-140) for the final commissions, except in cases where the party makes proof under section 2301, Revised Statutes, when no final commissions will be col-

lected, and, therefore, only one form of receipt (4-140*a*) will be issued.

"You will report the purchase money in all cases upon your current cash abstracts, but, except when proof is made under section 2301, Revised Statutes, no cash certificate will be issued. In all other respects you will use the ordinary homestead and townsite blanks in connection with the entry of these lands, continuing your regular series of numbers, but indicating upon the entry papers and abstracts that the entries for these lands are made under the act of August 15, 1894, section 12.

"Should any of the parties named in the second paragraph of the portion of the act quoted, file applications in your office for the purchase of the lands therein referred to, you will forward the same through this office for the consideration of the Department.

"No comment appears necessary upon the closing paragraph of section 12.

"Very respectfully,

"S. W. LAMOREUX,
"*Commissioner.*

"Approved:
"HOKE SMITH,
"*Secretary.*"

"BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

"A PROCLAMATION.

"WHEREAS, Pursuant to section one, of the act of Congress, approved July thirteenth, eighteen hundred and ninety-two, entitled 'An act mak-

ing appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the fiscal year ending June thirtieth, eighteen hundred and ninety-three, and for other purposes,' certain articles of agreement were made and concluded at the Yankton Indian Agency, South Dakota, on the thirty-first day of December, eighteen hundred and ninety-two, by and between the United States of America and the Yankton tribe of Sioux or Dacotah Indians upon the Yankton reservation, whereby the said Yankton tribe of Sioux or Dacotah Indians, for the consideration therein mentioned, ceded, sold, relinquished, and conveyed to the United States, all their claim, right, title, and interest in and to all unallotted lands within the limits of the reservation set apart to said tribe by the first article of the treaty of April nineteenth, eighteen hundred and fifty-eight, between said tribe and the United States; and

"*Whereas*, It is further stipulated and agreed by article eight that such part of the surplus lands by said agreement ceded and sold to the United States as may be occupied by the United States for agency, schools, and other purposes, shall be reserved from sale to settlers until they are no longer required for such purposes, but all of the other lands so ceded and sold shall, immediately after the ratification of the agreement by Congress, be offered for sale through the proper land office, to be disposed of under the existing land laws of the United States, to actual and bona fide settlers only; and

"*Whereas*, It is also stipulated and agreed by article ten that any religious society, or other

organization, shall have the right for two years from the date of ratification of the said agreement, within which to purchase the lands occupied by it under proper authority for religious or educational work among the Indians, at a valuation fixed by the Secretary of the Interior, which shall not be less than the average price paid to the Indians for the surplus lands; and

"*Whereas*, It is provided in the act of Congress accepting, ratifying, and confirming the said agreement, approved August 15, 1894, section 12 (Pamphlet Statutes, Fifty-third Congress, second session, pp. 314-319),

"That the lands by said agreement ceded, to the United States shall, upon proclamation by the President, be opened to settlement, and shall be subject to disposal only under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common school purposes, and be subject to the laws of the State of South Dakota:

Provided, That each settler on said lands shall, in addition to the fees provided by law, pay to the United States for the land so taken by him the sum of three dollars and seventy-five cents per acre, of which sum he shall pay fifty cents at the time of making his original entry and the balance before making final proof and receiving a certificate of final entry; but the rights of honorably discharged Union soldiers and sailors, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States, shall not be abridged except as to the sum to be paid as aforesaid.

"That the Secretary of the Interior, upon proper plats and descriptions being furnished, is hereby authorized to issue patents to Charles Picotte and Felix Brunot, and W. T. Selwyn, United States interpreters, for not to exceed one acre of land each, so as to embrace their houses near the agency buildings upon said reservation, but not to embrace any buildings owned by the Government, upon the payment by each of said persons of the sum of three dollars and seventy-five cents.

"That every person who shall sell or give away any intoxicating liquors or other intoxicants upon any of the lands by said agreement ceded, or upon any of the lands included in the Yankton Sioux Indian Reservation, as created by the treaty of April nineteenth, eighteen hundred and fifty-eight, shall be punishable by imprisonment for not more than two years and by a fine of not more than three hundred dollars, and

"*Whereas*, All the terms, conditions, and considerations required by said agreement made with said tribes of Indians and by the laws relating thereto, precedent to opening said lands to settlement, have been, as I hereby declare, complied with:

"*Now, therefore*, I, GROVER CLEVELAND, President of the United States, by virtue of the power in me vested, by the Statutes hereinbefore mentioned, do hereby declare and make known that all of the lands acquired from the Yankton tribe of Sioux or Dacotah Indians by the said agreement, saving and excepting the lands reserved in pursuance of the provisions of said agreement and the act of Congress ratifying the same,

will, at and after the hour of twelve o'clock, noon (central standard time), on the twenty-first day of May, 1895, and not before, be open to settlement, under the terms of and subject to all the conditions, limitations, reservations, and restrictions contained in said agreement, the statutes hereinbefore specified and the laws of the United States applicable thereto.

The lands to be so open to settlement are for greater convenience, particularly described in the accompanying schedule, entitled 'Schedule of Lands within the Yankton Reservation, South Dakota, to be opened to settlement by Proclamation of the President,' and which schedule is made a part hereof.

"IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

DONE at the city of Washington this sixteenth day of May, in the year of our Lord, one thousand eight hundred and ninety-five, and of the Independence of the United States, the one hundred and nineteenth.

(SEAL.) "GROVER CLEVELAND.

"By the President:
"EDWIN F. UHL,
"*Acting Secretary of State.*

"(The schedule of vacant lands mentioned in the preceding is omitted.)"

IX.

The Pipestone Reservation Taken by Respondent for Public Use.

Inspector James McLaughlin, an authorized agent of the United States, in a report to the Secretary of the Interior dated October 2, 1899, declared that "all of the said reservation" had been taken by the Government for the use of the educational institution which the Secretary of the Interior has erected thereon. This report was approved by the Secretary of the Interior and submitted to Congress.

This Court will also take judicial notice of the following acts appropriating funds to the use of the Pipestone Industrial School.

1900 (31 Stat., 244-1081), $27,550; $38,550.
1902 (32 Stat., 272-1004), $39,550; $56,050.
1904 (33 Stat., 214-1075), $29,050; $56,500.
1906 (34 Stat., 350-1033), $51,175; $46,075.
1908 (35 Stat., 82- 794), $41,675; $45,675.
1910 (36 Stat., 276-1065), $41,675; $41,675.
1912 (37 Stat., 525), $46,175.
1914 (38 Stat., 88- 590), $45,875; $55,175.
1916 (39 Stat., 134- 977), $65,675; $74,675.
1918 (40 Stat., 572), $48,650.
1920 (41 Stat., 13-419-1235), $54,650; $54,650; $62,650.
1922 (42 Stat., 570-1190), $51,000; $52,000.
1924 (43 Stat., 405-1156), $59,000; $65,750.

As a result of these extensive and continuous appropriations the Pipestone Industrial School today boasts over twenty buildings, to say nothing of an

experimental farm, for which the Secretary of the Interior is responsible by statute. That institution is regularly advertised as a governmental institution and listed as such in the annual reports of the Commissioner of Indian Affairs, being conducted in accordance with the regulations of the Department of the Interior.

In the face of these facts it would be unworthy of respondent to contend before this Court, as the Secretary of the Interior did before the lower court, and is doing in other litigation, that the Red Pipestone Quarries or Pipestone Reservation had not been taken by the Government. It is almost unbelievable that the Court below could have so held.

To meet such a contention it is only necessary to inquire, what would be the result if the Yankton Tribe should suddenly undertake to exercise its admitted unrestricted and exclusive right in the premises?

Is it conceivable that even a small body of Indians would be permitted to pitch their tepees on the experimental farm, or occupy the school buildings and their closes "unrestricted"?

> "It is not necessary that property should be absolutely taken. Serious interruption to the common and necessary use of property will be equivalent to taking within the meaning of the Constitutional provision. * * * (Pumpelly *v.* Green Bay & M. Canal Co., 13 Wall., 666."

See also Clifford *v.* United States, 34 Ct. Cl., 233, and Shoemaker *v.* United States, 148 U. S., 298.

No further discussion of the point is necessary.

The question remains, however, how was the land taken?

At the time the Pipestone Reservation was taken by the Government there were but three conceivable ways possession of it could be acquired—by voluntary cession, by condemnation under the sovereign right of eminent domain, and by the out-and-out misappropriation or conversion of the property.

Inspector McLaughlin reported that the reservation was taken "without appraisal."

But this does not necessarily imply that it was converted, for where it is possible to construe the acts of the Government as legal that construction will be preferred to one that would make it guilty of a wrongful act. As declared in Calder *v.* Bull, 3 Dall., 386, it is not to be presumed that Congress will pass laws to deprive citizens of rights vested in them by existing laws, unless for the benefit of the whole community and on making full satisfaction.

While the Government did act in this case in an irregular way with respect to the taking of the property, never once was it the intent of Congress that it should do so, and Congress was quick to seek to cure the irregularity of the Government's acts.

In 1891 there were but two legal methods by which petitioners' interest in the Pipestone Reservation, without regard to what it was—whether a right, title, or mere claim—could have been extinguished by the United States—one by the voluntary consent of petitioners, the other by the exercise of the sovereign

right of eminent domain. This was clearly recognized by Congress.

In the first place, by the Act of March 2, 1889, with a view to the possible acquisition of the Pipestone Reservation by the Government, through condemnation of parts of it, express provision was made for the appraisement of its value.

Two years later, still recognizing the "persistent" claim of petitioners to the Pipestone Reservation, by the Act of February 16, 1891 (26 Stat., 764), Congress directed the Secretary of the Interior to acquire title thereto for the purpose of a governmental educational institution, by "purchase, condemnation, or otherwise," the word otherwise, of course, only including legal means.

By these two acts was manifested the indisputable purpose of Congress to take petitioners' land only in the most regular legal way—to make just compensation for such of it as was taken under its authority. It neither contemplated nor authorized any other course.

Pursuant to the latter act the Secretary of the Interior entered upon the land in the name of the United States, and subjected the entire reservation to the use of the governmental educational institution that has been erected thereon. (Report of Inspector James McLaughlin, House Document No. 535, 55th Cong., 1st Sess., p. 31.)

It is true that the Secretary of the Interior did not negotiate a voluntary agreement with petitioners by which they either sold or gave the land to the Government, and it is also true that he failed to have the

land condemned in accordance with existing statutes regulating the exercise of the sovereign right of eminent domain. But already the land had been appraised under the Act of 1889.

Under these circumstances it is obvious that the assumption of authority by the Secretary of the Interior over the land was far from a conversion of it by the United States since his acts were wholly unauthorized, and were in no way binding upon petitioners nor the United States. United States *v.* Cook; Leavenworth, etc., R. Co. *v.* U. S.; Wilcox *v.* Jackson; United States *v.* La Chappelle; United States *v.* Carpenter, *supra*.

Being unauthorized, those acts were void and had no more effect upon petitioners' title than if never done.

Nor has Congress in the exercise of its undoubted plenary power to accept the lands taken on behalf of the United States in its name without authority, in any way undertaken to adopt the acts of the Secretary of the Interior. On the contrary, when informed of the fact that the Pipestone Reservation had been appropriated to public use without compliance with the Act of February 16, 1891, and that petitioners had not been compensated therefor, by the Act of June 7, 1897 (30 Stat., 87), the Secretary of the Interior was directed to negotiate an agreement with petitioners looking to their compensation. Thereupon, acting upon the authority of the Secretary of the Interior, Inspector James McLaughlin negotiated an agreement with petitioners on October 2, 1899, in which they agreed to

accept the sum of $100,000 in full payment for their *interest* in the property, whatever that interest might be.

Is such a transaction to be construed as a conversion of petitioners' property by the United States simply because an executive officer did in its name what he had no right to do, and what Congress recognized he had no right to do?

It is submitted that it was nothing more than a case of the exercise of the right of eminent domain, though irregularly performed, inasmuch as the compensation to be paid was agreed upon by the parties after the property was taken instead of before.

Such cases often occur. The record in this very case shows that it occurred in connection with the right of way through the Pipestone Reservation condemned under the Act of 1889 for the Cedar Rapids, Iowa and Northwestern Railroad Company. But it has never been argued that the fact that compensation was made subsequent to the taking of possession of the right of way constituted the taking a conversion.

X.

Petitioners Entitled to Just Compensation.

The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation.

> "The etymology of the word 'compensation' presents the idea of balancing one thing against another since to compensate is to render something which is equal to that taken or received.

The word 'just' was not intended to have a mere literal meaning as opposed to unjust, but as placing the matter upon a broad and equitable basis." (Lewis on Eminent Domain, p. 584.)

"The just compensation required by the Constitution to be made to the owner is to be measured by the loss occasioned to him by the appropriation." Bauman *v.* Ross (1897), 167 U. S., 574.

"The value of the property to the Government for its particular use is not a criterion, but the owner is to be paid its fair market value for all available uses and purposes." U. S. *v.* Chandler Dunbar Water Power Co. (1913), 229 U. S., 53.

"'Just compensation,' therefore, as used in the Constitution, means a fair and full equivalent for the loss sustained by the taking for public use." Chesapeake & Ohio Canal Co. *v.* Key, 3 Cranch (U. S. C. C.), 599; San Francisco R. R. Co. *v.* Coldwell, 31 Cal., 367.

XI.

The Value of the Property Taken at the Time it was Taken.

The value of the land taken pursuant to the Agreement of 1892, at the time it was taken, is to be determined in accordance with the long-established policy of Congress which is fully set out in H. R. Rep. No. 227, February 24, 1830, 21st Con., 1st Sess., as follows:

"The Indians are paid for their unimproved lands as much as the privilege of hunting and taking game upon them is supposed to be worth,

> and the Government sells them for what they are worth to the cultivator. The difference between those two values is the profit made by asserting the original rights of discovery and conquest. * * * Improved lands or small reservations in the States are in general purchased at their full value to the cultivator. * * * Thus the practice of buying Indian titles is but the substitute which humanity and expediency have imposed in place of the sword in arriving at the actual enjoyment of property claimed by the right of discovery and sanctioned by the natural superiority allowed to the claims of civilized communities over those of savage tribes. * * * "

The Court will take judicial notice of the fact that the value of unimproved Indian lands has ordinarily been assessed at $1.25 per acre. That amount has commonly been allowed the Sioux Indian in treaties and agreements with them. With respect to the value of the Pipestone Reservation at the time it was taken, there can be no doubt. It was actually appraised under the Act of 1889. If that appraisal assessed the value of a mere right of way 100 feet wide at $1,740, and required that amount to be paid petitioners by the Cedar Rapids, Iowa Falls and Northwestern Railway Company in 1891, it is not difficult to estimate the value of the entire 640 acres constituting the reservation.

Fortunately, an exact appraisal of the value of the Pipestone Reservation is of record herein.

A study of the report of Inspector James McLaughlin of October 9, 1899, with which he transmitted the

agreement of petitioners of October 2, 1899, to accept $100,000 in payment for their interest in the Pipestone Reservation, will show that the said agreement was in every respect a mutual appraisement of the value of the property taken at the time it was taken. It was made at the instance of the United States, transmitted to the Department of the Interior on October 9, 1899, to Congress by the Department on March 24, 1900, and finally on April 4, 1906, the Senate Committee on Indian Affairs rendered a favorable report thereon, recommending the ratification of the same and the payment of the agreed amount.

This being so, respondent is estopped from denying the mutually appraised value of the property as $100,000.

> "If the party condemning takes possession of the property under the proceedings, * * * it will be estopped from prosecuting objections to the report of the proceedings." (Lewis on Eminent Domain, p. 703, citing Marquette, Houghton & O. R. R. Co. *v.* Probate Judge, 53 Mich., 217.)

Therefore, while the necessary legislation for the compensation of petitioners has never been enacted, it is submitted that petitioners are not only entitled at law to the agreed value of the property as mutually appraised by them and respondent, but that equity forbids the assessment by this Court of a lesser value for the land than petitioners were induced by respondent to agree to accept for the same pursuant to the Compensatory Act of 1897.

XII.

Just Compensation in this Case Includes Interest.

The Jurisdictional Act of June 3, 1920, expressly provided that the Court of Claims should determine what amount, if any, is legally due petitioners for lands that may have been taken by the United States, and not merely for lands misappropriated.

It is not to be argued with reason that what is "legally" due petitioners for property taken from them for public use in the way described is less than that to which they are entitled under the Constitution, which is just compensation.

And where payment for the property taken is withheld just compensation includes interest to the date of payment on the value at the time the property was taken, interest being the equivalent in law for the withholding. Mo. River, Ft. Scott and Gulf R. R. Co. *v.* Owen, 8 Kan., 409; Lawrence *v.* Second Municipality, 2 La. An., 651; Gay *v.* Gardiner, 54 Me., 477; Bangor & Piscataqua R. R. Co. *v.* McComb, 60 Me., 290; Putnam *v.* Boston & Me. R. R. Co., 7 Allen (Mass.), 313; Reed *v.* Hanover Br. R. R. Co., 105 Mass., 303; Railroad Co. *v.* Gessner, 20 Pa. St., 240; Del., etc., R. R. Co. *v.* Benson, 61 Pa. St., 369; Warren *v.* First Div. St. Paul & Pac. R. R. Co., 21 Minn., 424; Minneapolis *v.* Wilken, 30 Minn., 145; Phila. *v.* Miskey, 68 Pa. St., 49; Uncake *v.* Chicago, M. & St. P. Ry. Co., 67 Wis., 108; Seefeld *v.* M. & St. P. Ry. Co., 67 Wis., 96.

The rule which makes interest an element of just compensation for property taken when payment is withheld is one which the United States uniformly enforces against those on behalf of whom it permits property to be condemned under the provisions of Sections 3632-3645, Judicial Code. (So. Pac. R. Co. *v.* U. S. (No. 1), 200 U. S., 341, 352-3; 25 Opinions Attorney General, 626, 631.) Thus, in the case of United States *v.* Minnesota, recently decided by the Supreme Court, the United States sued the State of Minnesota for the value of the Chippewa lands appropriated by it to public use with interest added as an element of the just compensation due the Indian owners.

In Monongahela Navigation Co. *v.* United States, 148 U. S., 312, private property was taken for public use under the provisions of section 10 of the Lever Act, in which act no mention of interest as a part of the compensation to be paid was made. This Court held that the compensation to which the owner was entitled was the full and perfect equivalent of the property taken, and that the right to just compensation which is guaranteed by the Constitution could not be taken away by statute.

The Monongahela decision was cited with approval in Seaboard Air Line Ry. *v.* United States, 261 U. S., 299, 304, in which, with respect to just compensation, Mr. Justice Butler, delivering the opinion, went on to say:

> "It rests on equitable principles and it means substantially that the owner shall be put in as good position pecuniarily as he would have been

if his property had not been taken. United States *v.* Rogers (C. C. A., Eighth Circuit), 257 Fed., 397, 400. He is entitled to the damages inflicted by the taking. Northern Pacific Ry. Co. *v.* North American Telegraph Co. (C. C. A., Eighth Circuit, 230 Fed., 347, 352, and cases there cited.

"The United States in effect claims that the owner is entitled to no more than the value of the land, as of date of taking, to be paid at a later time, when ascertained. The owner has been deprived of the land and its use since the taking, May 23, 1919. The value of the property, as ascertained by the President, was $235.80, and this was allowed with interest from date of taking. But as judicially determined later, the value when taken was $6,000.

"The owner's right does not depend on contract, express or implied. A promise to pay is not necessary. None is alleged. This suit is a part of the authorized procedure initiated by the United States for the condemnation of the land. The owner was not satisfied with the amount fixed by the President and sued. A necessary condition of the taking is the ascertainment and payment of just compensation. Monongahela Navigation Co. *v.* United States, 148 U. S., 312, 327; Searl *v.* School District, Lake County, 133 U. S., 553, 562; United States *v.* Jones, 109 U. S., 513, 518, *et seq.*; United States *v.* Sargent, 162 Fed., 81, 83. It is not suggested in this case that the provisions of Sec. 10 of the Lever Act do not meet the constitutional requirement. The only question here is whether payment at a subsequent date of the value of the land as of the date of taking pos-

session is sufficient to constitute just compensation.

"In support of its contention the Government cites United States *v.* North American Transportation & Trading Co., 253 U. S., 330. That case does not sustain its contention. That was a suit in the Court of Claims based on an implied promise of the United States to pay for property appropriated by it. It was not a condemnation case. The distinction between that case and a condemnation case is pointed out in the opinion. It was there suggested, without so deciding, that in the case of condemnation of land, interest might be collected, even in the absence of state enactments allowing it adopted by the conformity provisions.

"The case of United States *v.* Rogers, 255 U. S., 163, is a condemnation case, and it was held that the owner was entitled as a part of the just compensation to interest on the confirmed award of the commissioners from the time when the United States took possession. The land was situated in New Mexico, and the proceedings were had under the Conformity Act of August 1, 1888, c. 728, 25 Stat., 357. Interest was allowed, not by virtue of state statute, but as constituting a part of the just compensation safeguarded by the Constitution. Speaking for the Court, Mr. Justice Day said: 'Having taken the lands of the defendants in error, it was the duty of the Government to make just compensation as of the title when the owners were deprived of their property.' (Citing Monongahela Navigation Co. *v.* United States, *supra*, 341.)

"It is obvious that the owner's right to just compensation cannot be made to depend upon

state statutory provisions. The Constitution safeguards the right and Sec. 10 of the Lever Act directs payment. The rule above referred to, that in the absence of agreement to pay or statute allowing it the United States will not be held liable for interest on unpaid accounts and claims, does not apply here. The requirement that 'just compensation' shall be paid is comprehensive and includes all elements and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation. Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added. The legal rate of interest, as established by the South Carolina statute was applied in this case. This was a 'palpably fair and reasonable method of performing the indispensable condition to the exercise of the right of eminent domain, namely, of making "just compensation" for the land as it stands, at the time of taking.'" United States *v.* Sargent (C. C. A., Eighth Circuit), 162 Fed., 81, 84.)

"The addition of interest allowed by the District Court is necessary in order that the owner shall not suffer loss and shall have 'just compensation' to which he is entitled."

That just compensation includes interest was also held in an exhaustive opinion handed down by Mr. Justice Butler in Miller *v.* Robertson, 266 U. S., 243.

Plainly, then, the instant case is not one which falls within the rule against the allowance of interest as laid down in United States *v.* Omaha Tribe of Indians, 253 U. S., 275.

XIII.

Equity Demands That Just Compensation, Including Interest, be Made Herein.

Both the Act of June 3, 1920, and the Act of January 9, 1925, require this claim to be determined in accordance with equitable principles.

The facts show that both the Pipestone Reservation and the 152,692.04 acres taken by respondent pursuant to the agreement of 1892, were appropriated to public use.

Since, under the Vth Amendment of the Constitution petitioners are entitled to just compensation for the property taken, of whatever it may have consisted, it is immaterial whether petitioners had acquired title to the fee in the Pipestone Reservation under the Act of 1894 or whether they merely owned a right of *profit à prendre* therein. It has been shown that if they did not own the fee they at least owned the right of profit *à prendre*, by virtue of the Treaty of 1858. Moreover, they not only claimed the fee, but as declared by the Court of Claims itself, they deemed their right, whatever it was, a valuable right, and persistently asserted their claim thereto.

In the case of the Ute Indians *v.* The United States, 45 Ct. Co., 440, it was said:

> "Even if we admit that they had no valid title to any lands, yet they claimed some title and honestly claimed it, and the yielding of such a claim to a party who wishes to purchase it is a good consideration."

The United States is the guardian of petitioners and subject to all the responsibilities and liabilities of a political guardian under the law of nations. The Question of Aborigines in the Law of Nations, Snow (Putnam, 1921), being a special report to the Department of State, 1919, p. 39.

Of this relation equity must take cognizance.

It may be argued that the rules applicable to an ordinary guardian are not applicable to a political guardian. Such a contention is as untenable in law as in equity and good conscience. Civilized states do not confiscate the property of their nationals.

Moreover, the principles of international law are embodied in the law of the United States.

As declared in the report of the British Parliamentary Committee of 1837 on Aboriginal Tribes, the duties of civilized states which assume a guardianship over aborigines are "precisely those of guardianship and tutorship." Snow, *Ibid.*, p. 39. See also Snow, p. 174 *et seq.*

But it is not necessary to look to the rules of international law, as embodied in the law of the United States.

If this case is not, as asserted, a clear case of eminent domain, then the property taken must have been converted since there was no voluntary cession of it.

Where the guardian has converted lands belonging to the ward the lands are impressed with a constructive trust for the benefit of the ward. Am. & Eng. Ency. of Law, vol. SV, p. 75, and collected authorities.

Whenever the guardian converts the ward's property to his own use, the ward has the election to repudiate the transaction and hold the guardian to account as if the conversion had not been made, or affirm it and claim the resulting benefits. *Ibid.*, p. 81, and collected authorities.

And if the guardian has used the ward's property he will be charged with the fair value of the use. *Ibid.*, p. 95, and authorities cited.

When the ward's property has passed, by the voidable act of the guardian, into the hands of third persons with notice actual or constructive of the lack of authority of the guardian to convey the same, the ward can set aside their title and recover his property. *Ibid.*, p. 83, and collected authorities.

Equity will not permit a great and powerful State like respondent, possessing as it does unlimited wealth in part drawn from petitioner's property, to measure its liability as guardian by a lower moral standard than it applies to the conduct of the sovereign states of its own Federal Union. Surely this Court will take notice of the fact that but recently the United States as guardian recovered judgment at its hands for the lands of the Chippewa tribe which had been converted

by the sovereign State of Minnesota and patented to *bona fide* purchasers. United States *v.* Minnesota, decided March 1, 1926.

Moreover, if the agreement of 1892 is void by reason of nonratification by the Act of 1894, it is the duty of the United States to cancel all patents to the lands not ceded by the Indians. United States *v.* Beebe, 127 U. S., 338; Leavenworth, etc., Ry. Co. *v.* United States; United States *v.* Carpenter, *supra,* and United States *v.* La Chapelle, 81 Fed., 152; Lone *v.* Pueblo of Santa Rosa, 249 U. S., 110; Crane *et al. v.* United States, 261 U. S., 219; United States *v.* Stone, 2 Wall., 525; Wilcox *v.* Jackson, 13 Pet., 493; The Ute Indians *v.* United States, 45 Ct. Cl., 440; United States *v.* Minnesota, decided March 1, 1926.

Plainly it will not be allowed to avoid that duty and at the same time claim the benefits accruing from the avoidance thereof.

XIV.

CONCLUSION.

The General Equities.

With respect to all the contentions put forward on behalf of petitioners in this brief, the general equities in their favor require to be considered.

Among those equities the character of petitioners is not to be ignored.

Of all the tribes of the United States there has not been a more loyal one than the Yanktons.

Father Hennepin found them inhabiting the region of the Pipestone Quarries in 1683, and Le Sueur in 1708. Lewis and Clark were hospitably received by them, and spent the winter of 1804 with them there. From the time that Lewis wrapped their infant chieftain—Struck-by-the-Ree—in the flag of the Republic, their loyalty has never faltered. (Handbook of Amer. Indians, Bureau of Am. Ethnology, Part 2.)

Of the Sioux massacre in Minnesota in 1862, they gave timely warning resulting in the saving of many white lives, nor did they take part with the other bands of the Sioux Nation, or Dakota League, in the uprisings under Sitting Bull in 1876, during which General Custer and his command were destroyed on the Little Big Horn, and the later disturbances of 1891. Thus, it is seen that they have befriended the United States even against their own blood kin and not without great sacrifices.

In the appendix of the answer of the United States in the case of the Cayuga Indians to the Memorial of his Britannic Majesty, which case was decided by the American-British Claims Arbitration in January, 1926, the Department of State, in referring to the political system of the United States with respect to the Indians, said:

> "It is this example which the United States since they became by their independence the sovereigns of the territory, have adopted and organized into a political system. Under that system the Indians residing within the United States are so far independent that they live under their own customs and not under the laws

> of the United States; that their rights upon the lands where they inhabit or hunt are secured to them by boundaries defined in amicable treaties between the United States and themselves; and that whenever those boundaries are varied, it is also by amicable and voluntary treaties, by which *they receive from the United States ample compensation for every right they have to the lands ceded by them.*" (Italics added.)

Was this solemn declaration—the most solemn that a Government is capable of making—meaningless?

Lastly, but by no means least, the sentimental value attached by petitioners to the "Red Pipestone Quarries," must be considered.

> "The land we live on, our fathers received from God, and they transmitted it to us, for our children and we cannot part with it."

So spake the venerable Indian chieftain—Cornplanter—to Washington in 1790. Am. St. Papers, Indian Affairs, Vol. I, p. 140.

> "The General Government will never consent to your being defrauded," replied Washington—the Great Grandfather—"but will protect you in all your just rights. * * *" *Ibid.*, p. 144.

This was no idle compact. It was the most solemn contract into which human beings could enter—one between a great and powerful Nation and a dependent race for whom before God it had assumed a trust which neither the fiat of a temporal ruler nor the mandate of a soverign people could avoid.

The Pipestone Reservation and the quarry it embraces is no ordinary tract of land. On the contrary, it was the shrine of the Yankton Sioux—the site of their religious ceremonials.

A usurper must tread lightly on sacred soil.

Fertile with the blood of their prophets, rich in the traditions of their martyrs, in immortal words the story of this Indian Mecca lives in Longfellow's Song of Hiawatha:

"*The Peace Pipe.*

"On the mountains of the Prairie,
On the great Red Pipe Stone Quarry,
Gitche Manito, the mighty
He, the Master of Life, descending
On the red crags of the quarry
Stood erect, and called the nations,
Called the tribes of men together.

* * * * *

"From the red stone of the quarry
With his hand he broke a fragment,
Moulded it into a pipe head.

* * * * *

"Gitche Manito, the mighty
Smoked the Calumet, the Peace Pipe
As a signal to the nations."

Here it was then—at the Red Pipestone Quarry—the very subject of this suit—that from the calumet of the Yanktons, its long stem bound with the blue and green of the mallard's down, symbolic of the spirit of

peace which they would have rise from the earth and spreading throughout the heavens, settle over all mankind, a friendly breath was breathed by them until—

Is the great and powerful Republic of the United States—a nation of untold wealth,—drawn in part under the fiction of the right of discovery out of the aboriginal lands of this continent, to be permitted without accounting ruthlessly to confiscate this "Nature's mosque"?

If so, let the Guardian Government out of self-respect through respect for truth, speak no more as it spoke but recently to its sister nation—Great Britain—of its sacred regard for Indian rights—of the "ample compensation" it makes for every Indian boundary which it varies.

Again, let it be enquired, what value shall equity assess for this hallowed spot?

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